SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

April 14, 1995

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Re: Intervine Outdoor
Advertising, Inc.

v

City of Gloucester
City Zoning Board of
Adjustment and City of
Gloucester City
Docket # L-013091-92

Dear Counsel,

This is an action in lieu of prerogative writs in which the plaintiff, Intervine

Outdoor Advertising, Inc. (Intervine), an applicant for a use variance (N.J.S.A. 40:55-70(d)) and a bulk variance (N.J.S.A. 40:55D-70(c)) alleges that: (a) the Board of Adjustment (Board) and the City of Gloucester (City) failed to review their master plan within the statutorily prescribed six year period of time (N.J.S.A. 40:55D-89); (b) the Board was arbitrary, capricious and unreasonable in its denial of Intervine's application for a variance and (c) the City abridged Intervine's federal and state constitutional right of freedom of speech by enacting its ordinance which prevents the erection and utilization of billboards within its geographical boundaries. U.S. Const. Amend. I, and N.J. Const. Art. I para. 6.

A. Review of Master Plan

Pursuant to N.J.S.A. 40:55D-89, a local "governing body shall, at least every six years, provide for a general reexamination of its master plan and development regulations by the planning board. . ." The plaintiff has presented the court with allegations couched in the phrase "upon information and belief" and without certification of any facts that the City and Board violated the mandate of the statute. However, the Board of Adjustment has provided the court with the City's resolution which attests to a reexamination conducted in December 1989, and the re-adoption of its Master Plan at least eighteen a prior to plaintiff's application.

Based upon the quality of the record before the court, a case has not been submitted by the plaintiff which would give rise to the

imposition of sanctions as expressed in N.J.S.A. 40:55D-89.1. The attack against the ordinance is completely inadequate to abrogate the presumption of validity which necessarily attaches to it.

B. Use and Bulk Variances

I

Intervine is a company engaged in erecting and maintaining freestanding, outdoor advertising structures. Intervine has entered into a tentative agreement to lease the property which is the subject matter of its application. The premises are located in an area zoned for industrial use as defined in its master plan. The property includes a large marsh area all of which is owned by Intervine's prospective lessor, except for several residences. This property is described in the City's zoning ordinance at Article XVI as being located in a "Port and Cargo Handling Zone." Additionally, the premises are located immediately adjacent to the Walt Whitman Bridge, which runs East and West across the Delaware river. This bridge is owned and operated by the Delaware River Port Authority. The westerly portion of the bridge is in Philadelphia, Pennsylvania and the easterly portion in Gloucester City, New Jersey. Large billboards of the type sought to be used by Intervine are presently located on the Philadelphia side of the bridge, but none exists on the New Jersey side. As stated by applicant's counsel at the hearing of September 10, 1992, "there's more signs on the Philadelphia side than you can count".

Along side of this bridge and within the City of Gloucester, Intervine desires to

construct three double-faced, free standing pole signs, one on the south side of the bridge and two on the north. These proposed signs would be 16 feet high and 60 feet wide and their faces would perceptually be parallel with the bridge. One pole is to support each sign. The bottom of the signs would be 25 feet above the road surface of the bridge and approximately 90 to 131 feet from the ground. Therefore, the highest point of these signs from ground elevations could be from 131 to 172 feet. Each pole would be at least five-to six feet in diameter.

Geographically, Gloucester city is bounded on the North by the Walt Whitman Bridge and the main branch of Newton Creek; on the East, by Haddon Township and the Borough of Mt. Ephriam; on the South, by Big Timber Creek; and on the West, by the river Delaware. Within these boundaries the city is fragmented by four major thoroughfares, each of which traverses the area in a generally north/south direction. They are, Broadway, West Jersey Seashore R/R line, the North/South freeway and State Highway 130.

Historically and demographically, Gloucester was an industrial city but is now primarily a residential one with a substantial portion being welfare dependent. The city is trying to recapture its historical significance and is in the process of developing the King street area which is one of the entry ways to the city and is very close to the area in dispute.

II

If the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. Medici v. BPR Co., 107 N.J. 1 (1987).

The applicant has admitted that the erection and use of a billboard is not inherently beneficial. However, it contends that the record shows by the required enhanced quality of proof that the intended use promotes the general welfare, and as a result of such proofs, the contrary conclusion by the board must be declared as arbitrary, capricious and unreasonable.

The proofs on this element can best be digested by referring to the transcript of the proceedings and the arguments of applicant's counsel. At the October 8, 1992 hearing the attorney stated, as a part of his summary to the Board, the following:

> Billboards and outdoor advertising play a very unique role in our society, in our economy, and today I think we're all aware that we're involved in a very deep recession, probably a lot of people in here would call it a depression. Outdoor advertising

stimulates commerce. It will also--in the proposal we set forth it will also bring cash flow into the coffers of the City of Gloucester in helping it to better this area.

. . .we're here to make a profit, but we realize to be profitable, we have to coexist with our neighbors, and in that sense we'd like the people here to know that we are sincere in our application. We're not here to take advantage of anyone. We're here for a profit motive, but that's part of the American way. Everybody here similarly has a job and they do it because they want to make a profit, but we're here also just to acknowledge the fact that we need-- we need relief from the Board, and we also really need relief from the citizens here to construct these signs. And, we're -- just -- my point is we're not here to take advantage of anyone. (Emphasis added)

> . . . The economic benefit to the applicant is not a good reason for granting a variance. We believe that these signs benefit the economy as a whole. They create commerce. They stimulate commerce. That's the reason why you put them up, so that people will see them and go buy X brand of soda or they'll buy X brand of whatever or they'll go to X casino or they'll do this or do that. They have a benefit to society.

What may be considered as a response to the applicant's assertion that there is a general public benefit derived from the existence of billboards, were the statements made at the public hearing by one of the residents, who, during his presentation, referred to published data:

> I just want to say one thing here. In August the

2nd, 1987, in the Philadelphia Inquirer a William Eckinburger called The Great Terrain Robbery and called billboards the junk mail of the American highway, which they really are.

. . . I'd like to read these four paragraphs. It says, "Four states: Hawaii, Alaska, Vermont and Main (sic) ban billboards. For the rest of the nation motorists find (sic) one-sided battle between scenery and signery. Contrary to industry propaganda, most of the information in part on billboards will be irreverent (sic) to the immediate purposes of their captive audiences... Americans seem to have forgotten to use the ugly -- have seem to have gotten used to the ugliness of billboards with the same indifference that munitions' workers develop towards dynamite, yet it appears certain that given the choice they would get rid of billboards. Whenever a referendum on the issue have (sic) appeared on

election day the overwhelming and popular vote was against billboards." If I go to down here it says, "A lot of people are indifferent to billboards. They have been a part of the scene so long that some people will take their offensiveness for granted, but any time the people are given a choice, wherever the issue has gone to popular referendum: Jacksonville, Tucson, Anchorage, Houston, Beaufort County, South Carolina, the vote goes overwhelmingly anti billboard. One of the great issues in this country right now is what is happening to the land, and billboards are one of the bad things that is happening to the land. Billboards erode our quality of life, flute our landscape, undermine our sense of place, and if every billboard disappeared from the face of the earth tomorrow no one would miss it."

(October 8, 1992, transcript, pages 63-65).

On the question whether the applicant has carried its burden of proof that its intended use promotes the general welfare of Gloucester City, this court's review of the record indicates that such record clearly supports the Board's determination that the grant of the variance would not promote the general welfare of its community. The record is totally void as to how the advertisement of various "colas", other consumer products and Atlantic City, New Jersey gambling directly benefits Gloucester City. What is clear from the record is that the applicant and the prospective lessor are the persons who will directly and significantly benefit by the construction and erection of the billboards. The purpose of the billboards is simply to make money, as honestly stated by applicant's counsel, who only attempted to change that assertion after counsel for the Board brought to his attention that such motive was an inappropriate one. Therefore, it's fair to conclude that the true purpose had already been stated. The value of the applicant's after - the - fact attempt to assign a different, purpose is quite minuscule at best. The general welfare of some community remote from the community wherein the application has been lodged or the benefit to some commercial entity which has no presence in the affected community is not the general welfare about which the law requires a local community to direct its attention when considering a use variance.

In addition to the above requirement, the applicant must show by the requisite proofs that the grant of a use variance is not inconsistent with the intent and purpose of

the master plan and zoning ordinance. Article 16 section 1603 of the ordinance, from which the applicant seeks relief, reads, in pertinent part, as follows:

> The text of all signs shall be limited to identification and functional purposes only. Identification signs shall contain the principal name of the establishment, firm or proprietor, its address, and a brief description of the goods or services offered. The text of a sign may also include a logogram or symbol of the use which it identifies. (1603 -2)
>
> No sign except functional signs, shall be located within twenty (20) feet of the existing or proposed right-of-way of any public road or street. (1603-5)
>
> No sign shall exceed twenty (20) feet in height. (1603-6)
>
> No sign shall be illuminated between the hours of 10 p.m. and 7 a.m. the following morning, unless the business or use so advertised is open to the

> public later than 10 p.m. in which case the establishment may keep its sign illuminated until the business closes, but not after. (1603-12)

The intent and purpose of the ordinance clearly seems to be to limit the size and place signage can be displayed and the length of time such signage can be artificially illuminated. Also, it is the intent of the ordinance to limit the subject matter of the signage to the purposes for which the property is being utilized, other than directional or "functional" purposes which are permitted.

From the record, it is clear that another purpose of the ordinance was to maintain some meaningful level of aesthetics in the community as a whole. Each party has conceded that aesthetics is an appropriate element to discuss when considering an application for use and bulk variances.

The question, therefore, becomes whether the applicant has shown, by the requisite proofs, that which they propose to do is not inconsistent with the intent and purpose of the master plan and the zoning ordinance.

The applicant produced a professional planner who opined that the construction of a billboard in the affected area was consistent with the master plan. He arrived at this conclusion by stating that "[t]he objective for the industrial port area is to reclaim as much of that area as possible for additional ratables for additional -- by using mixed

uses. Clearly, we're adding a use that is not there now that is going to increase the utility of this very small area parcel in a way that will have no -- I believe no significant impact -- no appreciable impact on the City or the public." In response to this testimony, a board member asked, ". . . are you saying that that will increase the real estate ratable value of that piece of property?" The witness replied, "Some, slightly."

One of the reasons for the applicant's contention that the Board was arbitrary and capricious was that they did not produce an expert who countered this testimony. Whatever the reason for not producing an expert to counter this testimony, the record clearly indicates the lack of a necessity to do so. The opinions given by the expert are totally unsupported by any fact. Nonexistent data can not be challenged. Each opinion is a net opinion and, as such, can not shift a burden to the Board to respond. It must not be forgotten, that it is the applicant who has the burden of proof, not the Board. See Tomko v Vissers, 21 N.J. 226, 238 (1956) and Chirichello v Zoning Board of Adj. Monmouth Park, 78 N.J. 544 (1979). The expert did not attempt to convey to the Board how construction of billboards would develop the port area when such billboards were to be utilized to advertise general commercial products unrelated to the port; for example, alcoholic beverages, "colas" and seashore gambling. There was public concern expressed that once billboards are erected, the area surrounding them could not and would not be developed. The prevention of development is

the antithesis of what the applicant's expert opined was the purpose of the Master Plan. It is also clear from the record that the Board was totally disenchanted with the owner of the lands since it has done nothing to develop the area. The expert did say that putting up billboards would be a new form of use which would constitute a mixed use permissible under the ordinance. However, just because billboards would be a different use, and therefore a "mixed use", does not answer the question whether the billboards are inconsistent with the Master Plan or the Zoning Ordinance. The possible lack of development, because no one would develop property in close proximity to a billboard, is totally inconsistent with the master plan, not consistent with it because it would become a mixed use, as opined by the applicant's expert.

Taking the record as a whole, it adequately supports the Board's conclusion that the applicant had not carried its burden of proof on the question whether the proposed use was consistent with the intent and purpose of the master plan and zoning ordinance.

Having failed to meet its burden with regard to these two elements, the Board was correct in its conclusion, and the record substantially supports the same.

C. Constitutionality of Ordinance

Intervine contends that Gloucester City's ordinance is facially and constitutionally infirm in that it allegedly infringes upon its first amendment and freedom of speech rights.

I.

Since it is the philosophy of our courts not to reach and determine a constitutional issue unless absolutely imperative in the disposition of litigation, Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971)--the "strict necessity" doctrine--this court must determine whether in fact the issue should be broached.

The applicant relies upon Bell v. Stafford Tp., 110, N.J. 384 (1988) for the proposition that Gloucester City does not had the right to prevent billboards in its community. Although Bell did not quote from the ordinance it was considering, there can be no doubt from the reading of the opinion that the ordinance must have specifically forbidden the erection of billboards within the township. Because of this blanket prohibition and the inadequacy of the record in showing that there was a significant governmental interest being advanced and that alternative means were available, the court declared the ordinance to be constitutionally infirm.

In this case, billboards are not mentioned in the ordinance; although, it is clear from the record presented that the township does not want any signs which by their nature would adversely impact upon its ability to reclaim and develop its town and would constitute an excessive amount of visual pollution. Also, it is clear from the ordinance that the size restriction of 100 square feet and the height restriction of 20 feet would essentially prevent Intervine from advertising on the

scale that its application projects. It desires to erect three double-faced signs of 960 square feet each; all of which are from 131 to 172 feet from ground level.

If this court had only the "c" (bulk) portion of the application to consider, then most assuredly, the doctrine of "strict necessity" would be applicable and this court would limit its analysis to the adequacy of the record related to the denial by the Board. This is so because sixty square feet of space can not be said to be a facially destructive attack against one's freedom of speech. As already discussed, the record below is adequate to support the denial of the requested "c" variance. Additionally, there can be no question that a municipality may regulate the noncommunicative aspects of signs sought to be erected within its geographical boundaries. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981) wherein the court stated;

> But whatever its communicative function, the billboard remains a "large, immobile, and permanent structure which like other structures is subject to . . . regulation.", (citation omitted). Moreover, because it is designed to stand out and apart from its surroundings, the billboard creates a unique

> set of problems for land-use planning and development.
> Id. 69 L Ed 2d at 811.

Even if one were to conclude that the doctrine should be applied, Schaad v. Ocean Grove Camp Meeting Ass'n 72 N.J. 237 (1977), overruled on other grounds, suggests that courts may in some cases address the constitutional question despite the absence of a strict necessity for doing so. Because the applicant has made the constitutional question a substantial portion of its argument, although not so in its complaint, and because the question of whether a commercial speech applicant has standing to raise noncommercial speech questions has evolved, prudence would dictate that the issue be addressed. In addressing this issue, Shaad, supra., at 251, is quite instructive.

> . . . where there is more than one potential constitutional basis for invalidation of a restriction based upon a statute and a dependent ordinance, as here, a court should, ordinarily, lean toward that ratio decidendi in judgment which will save as much of the statute and ordinance or of the range of their application, as possible, and rest its invalidation thereof on the narrowest

basis consistent with relief to the successful suitor.

The applicant contends, at, least inferentially, that the ordinance is infirm because one can only advertise subject matter that relates to the use of the business located on the property. Section 1603 (2) suggests this limitation. The transcripts of the hearings below clearly show that there is no desire by Intervine to advertise about any activity being conducted on the land on which the signs are to be placed. Also, and inferentially, because not argued, the size of the permissible signage in the community would only represent approximately 11% of the area desired by the applicant. Therefore, Intervine contends that these two factors impermissibly infringe upon its commercial freedom of speech.

Even though one may argue that this court's affirmance of the Board's denials of the "d" and "c" variance applications disposes of the matter, it is the opinion of the court that the constitutional questions raised by the two assertions should not be completely surrounded by and cloaked with the doctrine of strict necessity and thereby avoid their resolution.

II

Without a detailed history, it is sufficient to state that "[p]rior to 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment.", Valentine v. Chrestensen, 316

U.S. 52, 86 L. Ed.1262, 62 S. Ct. 920 (1942). However, the law has developed to such an extent that the United States Supreme Court has stated,

> The Constitution. . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.
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> Central Hudson Gas & Electric Corp. v Public Service Comm'n, 447 U.S. 557, 65 L.Ed. 2d 341, 100 S. Ct. 2343 (1980), at 562-563, 65 L. Ed. 341.

To determine the validity of government restrictions on commercial speech as distinguished more fully protected speech, the Court, in Central, adopted a four-part test. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. Metromedia,

Inc. v. San Diego, 69 L Ed. 2d 800, 815, citing Central.

There obviously can be no contention about the first and second criteria. There is no suggestion that the commercial advertising sought to be instituted will involve unlawful or misleading activity. With regard to the second criteria, the record below is replete with municipal concern about traffic hazards and aesthetics. The Delaware River Port Authority submitted their written objections for consideration by the Board, in which they expressed their concern regarding traffic. The applicant presented its expert who expressed opinions that the signs would have minimal or no impact upon traffic because of the proposed locations and because of the speed with which people can read and at the same time drive.

Our Supreme Court has "deemed aesthetics to be relevant when they bear in a substantial way upon land utilization." United Advertising Corp. v. Metuchen, 42 N.J. 1, 6 (1964). In Metromedia,Inc. v San Diego, supra., at 815, it was stated that it is far too ate to contend that either traffic safety or esthetics are not substantial governmental goals. That court has also found that the question of whether billboards have an impact on traffic safety is somewhat settled. Chief Justice Berger, dissenting in Metromedia at page 848, fn 2, stated that "Congress, too, has recognized the dangers to safety and the environment posed by billboards . . . ", citing to The Highway Beautification Act of 1965. It already being determined that these goals are valid as a matter of law and that

the relationship of billboards to traffic safety is fairly well established, there only remains the requirement that the record below support the conclusion that each was a goal of the municipality. The record below including the testimony to which the court previously alluded elsewhere in this opinion, adequately and reasonably support the existence of these municipal goals.

With regard to the fourth aspect; that is, the ordinance reaches no further than necessary to accomplish the given objective, Metromedia is quite instructive. Basically, it holds that if a sufficient basis for the municipality believing that billboards are traffic hazards and are unattractive (and this court has found such to be the case) then the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. It went on to say in Metromedia, "The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends." Gloucester City has not gone as far as perhaps it could because its ordinance does permit signs within the community. Since the record supports the Board's finding that the proposed billboards would constitute a traffic hazard and nothing short of visual pollution, this fourth aspect has been met.

The final aspect is the third Central Hudson criteria: Does the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? It is the opinion of the court that it does, notwithstanding the opinion of the applicant

that the record is void of any basis for the Board's conclusion.

This court has the required hesitancy to disagree with the accumulated, common-sense judgments of the Board, just as other reviewing courts have concluded when called upon to review whether billboards are real and substantial hazards to traffic safety. See Metromedia, supra, at 816. With regard to aesthetics, Metromedia held that "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." Id at 816. Aesthetic judgments are necessarily subjective and defy objective evaluation; however, a close inspection of the record below clearly indicates that the judgments of the Board and the City are not public rationalizations of an impermissible purpose, but a resolve to revitalize their community and recapture its historical significance. This court has not lost sight of the fact that the City is relatively poor in all its physical aspects and that the area concerned in this case is industrial in nature. However, the status of the law is not such that a community must be like historical Williamsburg in order to sustain a prohibition against billboards. The older portions of our major urban areas "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors." Medtromedia, at 854 (justice Rehnquist, dissenting). This seems from the record below to be the purpose of the city's ordinance.

Gloucester City, by permitting onsite advertising but prohibiting offsite advertising has obviously concluded that a commercial enterprise--as well as the interested public--has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. Metromedia, Inc. v San Diego, supra at 817, citing Railway Express, Inc. v. New York, 93 L. Ed. 533, (Jackson, J., concurring) and Bradley v Public Utilities Comm'n, 289 U.S. 92, 97, 77 L. Ed. 1053, 53 S. Ct. 577. This is especially so in this case where the noncommunicative aspect of the advertising (the billboard structure) is of such a nature that it would substantially destroy the use for which the City had determined the property should be put and as set forth in its master plan.

The distinction drawn by the municipality is an appropriate one. As the Metromedia-court concluded, " . . . offsite commercial billboards may be prohibited while onsite commercial billboards are permitted. In other words, and more definitively stated in this case, offsite commercial signs may be prohibited while onsite commercial signs are permitted. The distinction drawn by the City does not strengthen any argument that the applicant has presented in its request for a declaration of constitutional infirmity.

Accordingly, it is the opinion of this court that Gloucester City has resolved the conflict "between its land-use interests and

the commercial interests of those", such as the applicant, who is "seeking to purvey goods and services within" and outside of the city in favor of those interests set forth in its Master Plan. Metromedia, supra at 818. This court can not conclude from the evidence submitted that the City has drawn its ordinance broader than is necessary to meet its interests, or that it fails directly to advance substantial government interests. From the arguments and evidence presented, Gloucester City has met its burden and it has been clearly shown that a sufficiently substantial governmental interest is furthered by the scope of the ordinance. Therefore, the City's ordinance insofar as it regulates commercial speech meets the constitutional requirements of Central Hudson, supra.

III

The question which now presents itself is whether this court should reach and dispose of the noncommercial speech question raised by Intervine. It is the opinion of this court that it is not necessary to reach this question, even though the Ordinance has created exceptions which allow "Temporary signs announcing or advertising any political, educational, charitable, civic, professional, religious or like campaign or event for a consecutive period not to exceed sixty (60) days in any calendar year, providing they do not exceed fifty (50) square feet in size."

This exception is so broad that it seems to cover such a broad area of possible human discourse, that a conclusion that it infringes upon the applicant's First Amendment rights is

not reasonably supportable. Additionally, the permissible limitation in size is so far removed from what the applicant desires, it can not be held that Intervine's interest with regard to this specific question is even remotely significant, and the applicant has not presented such a position. Also, there is not a shred of evidence that on-site signs covered by the ordinance have ever been used for noncommercial messages nor are such signs at issue in this case. Further, there is no evidence in this case that remotely suggests that the City, by creating these few exceptions, is attempting to influence public opinion or to limit public debate on particular issues. Most assuredly, such conclusion can not be derived from the face of the ordinance. An attack on this ordinance on the basis of noncommercial speech infringement must await the time when the question is ripe for consideration and is under direct attack. Likewise, there is not a shred of evidence that alternate means of communicating do not exist.

In Schaad v. Ocean Grove Camp Meeting Association, 72 NJ 237, 251 (1977) citing Chief Justice Marshall while he was sitting on the circuit bench, the court said:

> No questions can be brought before a judicial tribunal. of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the

> court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligations of its laws should not be unnecessarily and wantonly assailed. Ex parte Randolph, 20 F Cas. pp. 242, 254 (No. 11,558) (C.C.D. Va. 1833).

Gloucester's ordinance should not be ripped apart on alleged constitutional grounds when the ordinance can be preserved to the extent necessary to resolve the crucial question before the court. There is no necessity to go further into the analysis of the ordinance where there has not been any proof that the applicant's non-commercial interests have been offended by the ordinance as drafted.

CONCLUSION

The applicant's motion for summary judgment is denied and it's complaint is dismissed with prejudice for the reasons set forth.

THEODORE Z. DAVIS